

ALJ/RIM/jt2

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Decision 18-04-014 April 26, 2018

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation and
Ordering Pacific Gas and Electric
Company to Appear and Show Cause
Why It Should Not Be Sanctioned for
Violations of Article 8 and Rule 1.1 of the
Rules of Practice and Procedure and
Public Utilities Code Sections 1701.2
and 1701.3.

Investigation 15-11-015

**REVISED DECISION GRANTING JOINT MOTION OF THE CITY OF
SAN BRUNO, THE CITY OF SAN CARLOS, THE OFFICE OF RATEPAYER
ADVOCATES, THE SAFETY AND ENFORCEMENT DIVISION, THE UTILITY
REFORM NETWORK, AND PACIFIC GAS AND ELECTRIC COMPANY FOR
ADOPTION OF SETTLEMENT AGREEMENT**

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Attachment A – Joint Motion for Adoption of Settlement Agreement

**REVISED DECISION GRANTING JOINT MOTION OF THE CITY OF
SAN BRUNO, THE CITY OF SAN CARLOS, THE OFFICE OF RATEPAYER
ADVOCATES, THE SAFETY AND ENFORCEMENT DIVISION, THE UTILITY
REFORM NETWORK, AND PACIFIC GAS AND ELECTRIC COMPANY FOR
ADOPTION OF SETTLEMENT AGREEMENT**

Summary

This revised decision grants the Joint Motion of the City of San Bruno, the City of San Carlos, the Office of Ratepayer Advocates, the Safety and Enforcement Division, The Utility Reform Network, and Pacific Gas and Electric Company (PG&E) (Settling Parties), and adopts the Settlement Agreement the Joint Parties entered into and executed. The Settlement Agreement resolves the Commission's investigation into eight separate proceedings in which PG&E admittedly failed to timely report *ex parte* communications, and engaged in improper *ex parte* communications, in violation of Commission Rules of Practice and Procedure, as well as certain provisions of the Public Utilities Code.

The decision adopts both the non-financial remedies articulated in the Settlement Agreement, as well as the following financial remedies:

| Financial Remedy | Amount |
|--|---|
| Gas Transmission and Storage Rate Case Ratemaking Remedy | PG&E shall forgo collection of \$63,500,000 in revenue requirements for the years 2018 and 2019 |
| General Rate Case Ratemaking Remedy | PG&E will implement a one-time adjustment of \$10,000,000 amortized in equivalent annual amounts for its next General Rate Case cycle |
| Compensation payable to the City of San Bruno and the City of San Carlos | PG&E shall pay \$6,000,000 to the City of San Bruno General Fund and \$6,000,000 to the City of San Carlos General Fund |
| Payment to the State of California General Fund | \$12,000,000 |

This proceeding shall remain open to consider whether PG&E's newly disclosed e-mail communications violate the Commission's *ex parte* rules and should result in the imposition of additional fines.

1. Background

The Commission opened this investigation into Pacific Gas and Electric Company's (PG&E) failure to timely report *ex parte* communications and for engaging in improper *ex parte* communications in violation of Article 8 of the Rules of Practice and Procedure (C.C.R. Title 20, Div. 1, Ch. 1, Sections 8.1 *et seq.*), Rule 1.1 of the Rules of Practice and Procedure,¹ and Pub. Util. Code §§ 1701.2(c)² and 1701.3(c)³ related to the following proceedings:

- Rulemaking (R.) 09-01-019, Rulemaking to Examine the Commission's Energy Efficiency Risk/Reward Incentive

¹ Rule 1.1 states: Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

² Section 1701.2(c) states: (c) The commission shall provide by rule for peremptory challenges and challenges for cause of the administrative law judge. Challenges for cause shall include, but not be limited to, financial interests and prejudice. The rule shall provide that all parties are entitled to one peremptory challenge of the assignment of the administrative law judge in all cases. All parties are entitled to unlimited peremptory challenges in any case in which the administrative law judge has within the previous 12 months served in any capacity in an advocacy position at the commission, been employed by a regulated public utility, or has represented a party or has been an interested person in the case.

³ Section 1701.3(c) states: (c) An alternate decision may be issued by the assigned commissioner or the assigned administrative law judge who is not the principal hearing officer. Any alternate decision may be filed with the commission and served upon all parties to the proceeding any time prior to issuance of a final decision by the commission, consistent with the requirements of Section 311.

Mechanism (Energy Efficiency Risk/Reward Incentive
Mechanism Rulemaking)

- R.11-02-019, Rulemaking to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms (Gas Pipeline Safety and Reliability Rulemaking)
- Application (A.) 09-12-020, Application of PG&E for Authority, Among Other Things, to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 2011 (PG&E's 2011 General Rate Case (GRC))
- A.09-09-021, Application of PG&E for Approval of 2008 Long-Term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms (PG&E Application for Approval of 2008 LTRO Results)
- A.09-12-002, Application of PG&E for Approval of the Manzanita Wind Project and Issuance of a Certificate of Public Convenience and Necessity (PG&E Application for Approval of Manzanita Wind Project)
- A.10-02-028, Application of Pacific Gas and Electric Company for Approval of its 2010 Rate Design Window Proposal for 2-Part Peak Time Rebate and Recovery of Incremental Expenditures Required for Implementation, and consolidated matter A.10-08-005 (PG&E Application for Approval of Peak Time Rebate)
- A.14-02-008, Application of Pacific Gas and Electric Company for Compliance Review of Utility Owned Generation Operations, Electric Energy Resource Recovery Account Entries, Contract Administration, Economic Dispatch of Electric Resources, Utility Retained Generation Fuel Procurement, and Other Activities for the Period January 1 through December 31, 2013 (PG&E 2013 ERRR Application)
- Investigation (I.) 12-01-007, Investigation into the Operations and Practices of Pacific Gas and Electric Company to Determine Violations of Pub. Util. Code § 451, General Order 112, and Other Applicable Standards, Laws, Rules and Regulations in Connection with the San Bruno Explosion and Fire on

September 9, 2010, and related investigations I.11-02-016 and I.11-11-009. (Pipeline Investigations)

Additionally, PG&E was ordered to show cause why it should not also be found to have violated the prohibition on *ex parte* communications in the Pipeline Investigations, as alleged by the City of San Bruno in the Pipeline Investigations.

2. Rules Applicable to Pacific Gas and Electric Company (PG&E) *Ex Parte* Communications⁴

Before discussing the merits of the Joint Motion, it will be helpful to set forth the *ex parte* rules and why it is paramount that this Commission zealously enforce their application to the appropriate proceedings. With the passage of Senate Bill (SB) 960⁵ in 1996, the Legislature amended Pub. Util. Code §§ 1701, *et seq.* (Chapter 9. Hearings and Judicial Review) and created proceeding classifications for matters coming before the Commission for a vote, as well as the attendant *ex parte* communication restrictions and reporting requirements. Consistent with the legislative directive in Pub. Util. Code § 1701.1(c)(1)(C), the Commission promulgated Rules of Practice and Procedure that, *inter alia*, adopted a set of rules regarding communications with decisionmakers and advisors.

⁴ In setting forth the *ex parte* rules as they existed at the time in which PG&E violated same, the Commission acknowledges that SB 215 (Leno, ch.807, Stats. 2016) made various substantive edits to Pub. Util. Code §§ 1701, *et seq.* But since these changes did not take effect until January 1, 2017, and do not apply retroactively, we judge PG&E's conduct based on the version of the *ex parte* rules as they existed during the 2010-2014 time frame in which PG&E *ex parte* communications occurred.

⁵ SB 960 (Leonard, ch. 96-0856).

2.1. What is an *Ex Parte* Communication

Pursuant to Pub. Util. Code § 1701.1(c) (4) and Rule 8(c), an *ex parte* communication has four components:

- any written or oral communication;
- between a “decisionmaker” and an “interested person”;
- in a matter before the Commission regarding a substantive (not procedural) issue; and
- that does not occur in a public hearing, workshop, other public setting, or on the record of the formal proceeding.

2.2. Who are “Decisionmakers” and “Interested Persons”

Rule 8.1(b) defines “decisionmaker” as any of the following:

- any Commissioner;
- the Chief Administrative Law Judge;
- the Assistant Chief Administrative Law Judge;
- the assigned Administrative Law Judge; and
- the Law and Motion Administrative Law Judge.

Rule 8.1(d) defines “interested person” as any of the following:

(1) any party to the proceeding or the agents or employees of any party, including persons receiving consideration to represent any of them;

(2) any person with a financial interest, as described in Article I (commencing with Section 87100) of Chapter 7 of Title 9 of the Government Code, in a matter at issue before the Commission, or such person's agents or employees, including persons receiving consideration to represent such a person; or

(3) a representative acting on behalf of any formally organized civic, environmental, neighborhood, business, labor, trade, or similar association who intends to influence the decision of a Commission member on a matter before the Commission, even if that association is not a party to the proceeding.

2.3. What are the *Ex Parte* Restrictions and Reporting Requirements

The *ex parte* restrictions and reporting requirements depend on the categorization of the proceeding before the Commission.

In any quasi-legislative⁶ proceeding, *ex parte* communications are allowed without restriction or reporting requirements. (Rule 8.3(a).)

In any adjudicatory⁷ proceeding, *ex parte* communications are prohibited. (Rule 8.3(b).)

Ratesetting⁸ proceedings are the most problematic when it comes to restrictions and reporting requirements. The rules are summarized below and the text can be found in Attachment B to this decision:

All-party meetings: Pursuant to Rule 8.3(c)(1), oral *ex parte* communications are permitted at any time with a Commissioner provided that:

- The commissioner invites all parties to attend; and
- Gives not less than three days' notice before the meeting.

Individual oral communications: Pursuant to Rule 8.3(c)(2), individual oral *ex parte* communications are permitted if:

- a decisionmaker agrees to the meeting;
- the interested person requesting the meeting notifies the parties at least three days before the meeting that the request has been granted; and

⁶ Pursuant to Pub. Util. Code § 1701.1(c)(1), quasi-legislative cases are those “that establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry.”

⁷ Pursuant to Pub. Util. Code § 1701.1(c)(2), adjudicatory cases “are enforcement cases and complaints except those challenging the reasonableness of any rates or charges as specified in Section 1702.”

⁸ Pursuant to Pub. Util. Code § 1701.1(c)(3), ratesetting cases are those “in which rates are established for a specific company, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms.”

- all other parties must be granted the same opportunity to meet with the decisionmaker.

Written *ex parte* communications: Pursuant to Rule 8.3(c)(3) written *ex parte* communications are permitted at any time provided:

- The interested person making the communication serves copies of the communication on all parties on the same day the communication is sent to a decisionmaker.

Ratesetting Deliberative Meetings and *Ex Parte* Prohibitions:

- Pursuant to Rule 8.3(c)(4)(A), the Commission may prohibit *ex parte* communications for a period beginning not more than 14 days before the day of the Commission Business Meeting at which the decision is scheduled for Commission action.
- Pursuant to 8.3(c)(4)(B), in a proceeding where a Ratesetting Deliberative Meeting has been scheduled, *ex parte* communications are prohibited from the day of the Ratesetting Deliberative Meeting through the conclusion of the Business Meeting at which the decision is scheduled for Commission action.

2.4. Duty to Report *Ex Parte* Communications

Rule 8.4 sets forth the requirements for reporting *ex parte* communications:

Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. Notice of *ex parte* communications shall be filed within three working days of the communication. The notice may address multiple *ex parte* communications in the same proceeding, provided that notice of each communication identified therein is timely. The notice shall include the following information: (a) The date, time, and location of the communication, and whether it was oral, written, or a combination; (b) The identities of each decisionmaker (or Commissioner's personal advisor) involved, the person initiating the communication, and any persons present during such communication; (c) A description of the interested person's, but not the decisionmaker's (or Commissioner's personal advisor's), communication and its content, to which description shall be

attached a copy of any written, audiovisual, or other material used for or during the communication

2.5. Ex Parte Restrictions and Reporting Requirements Promote the Dual Public Policies of Openness and Due Process

2.5.1. Openness

It is California's public policy that public agencies conduct their business and meetings in public. This policy is memorialized in the Bagley-Keene Open Meeting Act (Government Code §§ 11120, *et seq.*) which states:

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.⁹

The Commission is subject to the requirement to conduct its business and meetings publicly. (*See Disenhouse v. Peevey* (2014) 226 Cal.App.4th 1096, 1102, citing to *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 797.)¹⁰

⁹ Government Code § 11120. There are exceptions to the Bagley-Keene Open Meeting Act, but as none of them apply to the issues in this proceeding, they will not be discussed in this decision.

¹⁰ Other jurisdictions have endorsed the need for open administrative proceedings. In *Sangamon Valley Television Corp v. United States* (D.C. 1959) 269 F.2d 221, which this Commission cited to in Decision (D.) 07-07-020, the Court of Appeal spoke to the fundamental importance of

Footnote continued on next page

Ex parte restrictions complement the requirement of an open proceeding. If a party wishes to communicate with a decisionmaker in a proceeding that is subject to the *ex parte* rules, the appropriate notices must be followed so that all other parties and interested persons are aware of the extent of the communications. And in those proceedings where *ex parte* communications with decisionmakers are prohibited, the parties must adhere to the prohibitions to ensure that no one party obtains an unfair advantage through illegal backchannel communications. Thus, adherence to the *ex parte* rules in an open proceeding assures the parties and the public that the Commission is conducting its proceedings with the utmost transparency, ensuring that all interested persons have a complete understanding of the processes and information that the Commission has taken into account in rendering its decisions.

2.5.2. Due Process

Hand in hand with the need for openness in its proceedings is the requirement that *ex parte* restrictions and reporting obligations be adhered to in order to ensure due process. The concept of due process of law is found both the United States Constitution¹¹ and our California Constitution.¹² While the words “due process” are not defined in either constitution, the United States Supreme Court has provided guidance and has stated that in an administrative law

open administrative proceedings: “Interested attempts to influence any member of the Commission...except by recognized and public processes go to the very core of the Commission’s quasi-judicial powers.”

¹¹ U.S. Constitution, Fourteenth Amendment: “No state shall...deprive any person of life, liberty or property without due process of law.”

¹² Cal. Const. Art. I, § 7(a): “A person may not be deprived of life, liberty, or property without due process of law...”

context, due process requires some type of notice and an opportunity to be heard. (*Londoner v. Denver* (1908) 210 U.S. 373, 385-386; and *Bi-Metallic v. State Board of Equalization* (1915) 239 U.S. 441, 445.)

More recently, our California Supreme Court expressed a similar sentiment regarding the practical requirements of due process in *Today's Fresh Start, Inc. v. Los Angeles County Office of Ed.* (2013) 57 Cal.4th 197, 212:

In light of the virtually identical language of the federal and state guarantees, we have looked to the United States Supreme Court's precedents for guidance in interpreting the contours of our own due process clause and have treated the state clause's prescriptions as substantially overlapping those of the federal Constitution. (See, e.g., *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 736-737.) "The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 348; see *Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 546.) The opportunity to be heard must be afforded "at a meaningful time and in a meaningful manner." (*Armstrong v. Manzo, supra*, 380 U.S. at p. 552; accord, *People v. Allen* (2008) 44 Cal.4th 843, 869.) To ensure that the opportunity is meaningful, the United States Supreme Court and this court have identified some aspects of due process as irreducible minimums. For example, whenever "due process requires a hearing, the adjudicator must be impartial." (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025; see *Caperton v. A. T. Massey Coal Co.* (2009) 556 U.S. 868, 876; *Withrow v. Larkin* (1975) 421 U.S. 35, 47.) Beyond these broad outlines, however, the precise dictates of due process are flexible and vary according to context.

Under either the federal or California Constitution, due process requires that proceedings, including administrative proceedings such as the ones before this Commission, be open so that all parties have, at a minimum, notice, the

opportunity to be heard,¹³ the opportunity to present evidence and argument,¹⁴ and a decisionmaker who is free of bias for or against a party.

In *Pacific Gas & Electric Company v. Public Utilities Commission* (2015) 237 Cal.App.4th 812, 859, the Court explained the concept of due process as it applies to an administrative agency such as the Commission:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314. Four years later, our Supreme Court ruled on the application of this principle to the PUC: “Due process as to the commission’s...action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made.” (*People v. Western Air Lines Inc., supra*, 42 Cal.2d 621, 632.)

But the fundamental right to due process can be seriously undermined in the event that a party either engages in improper *ex parte* communications, or fails to report authorized *ex parte* communications. In *Matthew Zaheri Corp. v. New Motor Vehicle Board (Zaheri)* (1997) 55 Cal.App.4th 1305, 1319, the Court spoke of the harm that secret *ex parte* communications could have on the requirement of due process:

When an administrative adjudicator uses evidence outside the record there is a denial of a fair hearing because, as to that evidence, there has been no hearing at all, for the disadvantaged party has not been heard. (Citations omitted.) If a trial-type hearing is required by due process of law (*see* 2 Davis & Pierce, *Administrative Law*

¹³ *Armstrong v. Manzo* (1965) 380 U.S. 545, 550-552; *Traverso v. People ex rel Department of Transportation* (1992) 6 Cal.4th 1152, 1163-1166.

¹⁴ *Matthews v. Eldridge* (1976) 424 U.S. 319, 346-349.

Treatise (3d ed. 1994) § 9.5, pp. 43-61), its deprivation *a fortiori* violates the due process precept. The prohibitions against improper *ex parte* communications are measures imposed to avert this kind of due process violation.¹⁵

Proper adherence to the rules regarding the avoidance of improper *ex parte* communications, as well as the duty to report such communications, assures the parties and the public that the decisionmakers have comported themselves in an impartial manner. (See *Zaheri, supra*, 55 Cal.App.4th at 1319; D.07-07-020, 22.)¹⁶

When an *ex parte* violation has been found, “the Commission has broad authority under the Public Utilities Code to impose such penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest.”¹⁷ The Commission may consider if sanctions should be imposed pursuant to Pub. Util. Cod §§ 701, 2107, 2108, and Rule 1.1 of the Commission’s Rules of Practice and Procedure. As such, it is the Commission’s duty, even in the context of considering whether to

¹⁵ The prohibition against *ex parte* contacts with decisionmakers by outsiders can also be found in Calif. Rule of Prof. Conduct, Rule 5-300(B): “A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except: (1) In open court; or (2) With the consent of all other counsel in such matter; or (3) In the presence of all other counsel in such matter; or (4) In writing with a copy thereof furnished to such other counsel; or (5) In *ex parte* matters.” Because of their participation in adversarial proceedings, lawyers must also be especially sensitive to prohibited *ex parte* conduct. As Professor Michael Asimov writes in “Toward a New California Administrative Procedures Act: Adjudication Fundamentals.” 39 *UCLA Law Review* 1067, 1127-1128 (1992): “The rationale for a prohibition on *ex parte* contact is familiar to all lawyers: it is deeply offensive in an adversarial system that any litigant should have an opportunity to influence the decision-maker outside the presence of opposing parties.” PG&E’s attorneys must be aware of these prohibitions and have a duty to counsel PG&E’s employees as to these restrictions.

¹⁶ *Revised Proposed Interim Decision on Alleged Ex Parte Violations*.

¹⁷ D.07-07-020, 2007 Cal. PUC LEXIS 311 *36.

approve a Settlement Agreement, to weigh the fundamental policy goals behind the Commission's *ex parte* rules to determine if the settlement terms are both a sufficient penalty and a deterrent against such conduct occurring in the future.

3. PG&E's Improper *Ex Parte* Communications and Failure to Timely Report *Ex Parte* Communications

As we stated in the background section of this decision, the Commission became aware of PG&E having engaged in improper *ex parte* communications in A.13-12-012, the Application of PG&E Proposing Cost of Service and Rates for Gas Transmission and Storage Services for the Period 2015 – 2017 (Gas Transmission and Storage (GT&S) Proceeding). On September 15, 2014, in that proceeding, PG&E filed a “Notice of Improper *Ex Parte* Communications” giving notice of numerous written communications concerning the assignment of that proceeding to particular Administrative Law Judges (ALJs) in violation of Rule 8.3(f). By ruling dated September 17, 2014, the Law and Motion ALJ ordered PG&E to appear and show cause why it should not be sanctioned for those violations, and the Commission ultimately imposed sanctions on PG&E for those violations. (See D.14-11-041.)

On October 6, 2014, also in the GT&S Proceeding, PG&E filed an “Update Re September 15, 2014 Notice of Improper *Ex Parte* Communications” giving notice of improper *ex parte* oral communications with a Commissioner that had occurred on May 30, 2010, concerning matters in A.09-12-020 (PG&E's 2011 GRC), A.09-09-021 (PG&E's Application for Approval of 2008 LTRO Results), A.09-12-002 (PG&E Application for Approval of Manzana Wind Project), and R.09-01-019 (Energy Efficiency Risk/Reward Incentive Mechanisms

Rulemaking).¹⁸ These proceedings are categorized as ratesetting and, as such, are subject to Rule 8.3(c) and Rule 8.4. Rule 8.3(c) requires that notice of an individual meeting with a decisionmaker be given at least three days before the meeting, and Rule 8.4 requires that a description of the communication be reported within three business days of its occurrence.¹⁹

On December 22, 2014, in R.11-02-019 (Gas Pipeline Safety and Reliability Rulemaking) and in Pipeline Investigations, PG&E filed a “Late Notice of *Ex Parte* Communications” giving notice of improper *ex parte* communications with Commissioners that had occurred on September 9, 2011, November 21, 2011, and December 31, 2012, concerning matters in those proceedings:

| Date | Sender | Recipient(s) | Subject Matter |
|--------------------|---|--|--|
| September 20, 2011 | Jerry Hallisey, Esq. Hallisey and Johnson | Brian Cherry (Vice President, Regulatory Relations, PG&E) and Thomas Bottorff (Senior Vice President—Regulatory Relations, PG&E) | E-mail summarized meeting with Commissioner Ferron. Discussed support for the gas pipeline project and cost splitting between shareholders and ratepayers. |

¹⁸ This notice was subsequently filed in each of those dockets pursuant to Chief ALJ Sullivan’s December 4, 2014 ruling.

¹⁹ These rules apply to proceedings that have been categorized as ratesetting. A.09-12-020, A.09-09-021, A.09-12-002 and R.09-01-019 are categorized as ratesetting.

| | | | |
|-------------------|----------------|---|--|
| November 22, 2011 | Jerry Hallisey | Marc Joseph, Esq. Adams, Broadwell, Joseph & Cardozo, and Bob Balgenorth, former President State Building & Construction Trades Council of California; cc to Brian Cherry and Thomas Bottorff | E-mail summarized meeting between Brian Cherry and Commissioner Florio regarding cost recovery and pipelines. |
| January 1, 2013 | Brian Cherry | Thomas Bottorff | E-mail summarizes Brian Cherry's meeting with President Peevey regarding gas settlement, mediation, return on equity changes to PSEP, HECA, and Oakley |

The Gas Pipeline Safety and Reliability Rulemaking is categorized as ratesetting and, as such, is subject to Rule 8.3(c) and Rule 8.4 as described above. The Pipeline Investigations are categorized as adjudicatory and, as such, *ex parte* communications are prohibited pursuant to Rule 8.3(b).

On June 11, 2015, in A.10-02-028 and consolidated matter (PG&E Application for Approval of Peak Time Rebate), PG&E filed late notice of an *ex parte* communication that had occurred on January 28, 2014, with a Commissioner's personal advisor:

| Date | Sender | Recipient(s) | Subject Matter |
|-------------------------------|--------------------|---|--|
| January 28, 2014 (e-mail) | Sidney Dietz, PG&E | Michael Campbell, Office of Ratepayer Advocates (ORA) | Discusses elements of proposed decision. |
| January 28, 2014 (telephonic) | Sidney Dietz | Scott Murtishaw, advisor to President | Discussed the Joint Ruling and Amended |

| | | | |
|--|--|--------|---------------|
| | | Peevey | Scoping Memo. |
|--|--|--------|---------------|

This proceeding is categorized as ratesetting and, as such, communications with a Commissioner's personal advisor must be reported consistent with Rule 8.4 as described above. (See Rule 8.2.)

On May 21, 2015, in A.14-02-008 (PG&E 2013 ERRRA Application), PG&E filed notice of an improper *ex parte* communication that occurred on March 6, 2014 with a Commissioner:

| Date | Sender | Recipient(s) | Subject Matter |
|---------------|--------------|---------------|--|
| March 6, 2014 | Brian Cherry | Erik Jacobson | E-mail summarizes conversation between Brian Cherry and Commissioner Florio about the assignment of Administrative Law Judge Roscow. |

The communication concerned the assignment of a particular ALJ to the proceeding. Pursuant to Rule 8.3(f), "*ex parte* communications regarding the assignment of a proceeding to a particular Administrative Law Judge ... are prohibited."

In addition to admitting that it failed to comply with Rule 8, PG&E's filings demonstrate that it knowingly violated Pub. Util. Code §§ 1701.2(c) and 1701.3(c).²⁰

In order to get a sense of the full scope of PG&E's wrongdoing, the Commission said it would determine whether PG&E's admitted failure to file timely the *ex parte* notices, as well as its admission that it knowingly engaged in

²⁰ Section 1701.2(c) provides that *ex parte* communications are prohibited in adjudicatory cases. Section 1701.3(c) provides, in relevant part that a party that is granted an individual *ex parte* meeting send notice of the meeting at the time the request is granted, but "in no event shall that notice be less than three days."

prohibited *ex parte* communications, constitute a violation of Rule 1.1 of the Commission's Rules of Practice and Procedure. If found, this investigation must determine what sanctions should be imposed for these violations pursuant to Pub. Util. Code §§ 701,²¹ 2107,²² and 2108.²³

Finally, this Commission said it would consider in this investigation the following allegations of *ex parte* violations raised by the City of San Bruno in the Pipeline Investigations:

1. *Motion of the City of San Bruno For An Order To Show Cause Why Pacific Gas And Electric Company Should Not Be Held In Violation of Commission Rule of Practice And Procedure 8.3(b) (Rule Against Ex Parte Communications) and for Sanctions and Fees, filed on July 28, 2014.*
2. *Motion for Evidentiary Hearing on City of San Bruno's Motion for an Order to Show Cause as to Why Pacific Gas and Electric Company Should Not Be Held in Violation of Commission Rule of Practice and Procedure 8.3(b) and for Sanctions and Fees, filed on November 10, 2014.*

²¹ Section 701 states: "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

²² Section 2107 states: "Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense."

²³ Section 2108 states: "Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

4. The Meet and Confer Process

Pursuant to the January 8, 2016 Ruling Directing Parties to Engage in Meet and Confer Process and Setting Prehearing Conference, the parties engaged in several months of meetings where they discussed the following topics:

- Communications in the proceeding as identified in the Commission's Order Instituting Investigation and Ordering Pacific Gas and Electric Company to Appear and Show Cause Why It Should Not Be Sanctioned for Violations of Article 8 and Rule 1.1 of the Rules of Practice and Procedure and Public Utilities Code Sections 1701.2 and 1701.3 (OII Order), dated November 19, 2015;
- Additional communications that the City of San Bruno, the City of San Carlos, ORA, Safety and Enforcement Division (SED), and The Utility Reform Network (TURN) (Non-PG&E Parties) proposed adding to this proceeding;
- Factual stipulations in order to move undisputed facts into the evidentiary record so that the Commission can resolve the legal and policy issues for certain communications at issue without further discovery;
- Additional information requested by the Non-PG&E Parties (the Data Requests) regarding specific communications between PG&E and the CPUC;
- Protocols for PG&E to follow to respond to the Data Requests;
- Proposed schedule for PG&E to respond to the Data Requests; and
- Proposed schedule for the remainder of the proceeding.²⁴

In addition, the parties discussed the number and categorization of the various *ex parte* communications and made the following agreement:

²⁴ Joint Meet and Confer Process Report of The City of San Bruno, The City of San Carlos, The Office of Ratepayer Advocates, The Safety and Enforcement Division, The Utility Reform Network, and Pacific Gas and Electric Company (dated April 18, 2016 at 2).

- Category 1 is comprised of 135 communications (1-1 through 1-135) and generally consists of e-mails transmitting information – such as an analyst report, a news article, or a press release – from a PG&E employee to one or more individuals at the CPUC. The first 36 communications (1-1 through 1-36) are communications that already are included in the proceeding per the OII Order. The remaining 99 communications (1-37 through 1-135) are additional communications that one or more of the Non-PG&E Parties propose be added to the proceeding.²⁵
- Category 2 is comprised of 24 communications (2-1 through 2-24). Category 2 generally consists of e-mails concerning PG&E activities, and many involve descriptions of oral communications. The first 10 communications (2-1 through 2-10) are communications that already are included in the proceeding per the OII Order. The remaining 14 communications (2-11 through 2-24) are additional communications that one or more of the Non-PG&E Parties proposed to be added to the proceeding.²⁶
- Category 3 is comprised of 21 communications (3-1 through 3-21). None of the Category 3 communications are currently included in the proceeding. The Category 3 communications primarily consist of communications that reference potential oral communications, including meetings, meals, encounters, or site visits involving PG&E personnel and CPUC personnel, but do not provide much detail concerning those events. The Non-PG&E Parties have requested these Category 3 communications be included in the proceeding, asserting that while they do not appear to be *ex parte* violations themselves, the communications suggest that a violation may have occurred. The Parties have agreed to brief whether the Category 3 communications should be added to the proceeding, and have

²⁵ *Id.* at 4-5.

²⁶ *Id.* at 5-6.

recognized that PG&E would follow a similar protocol as for Category 2 if they are included.²⁷

5. The Settlement Discussions

After completing the above discovery and agreeing to the factual stipulations, the Settling Parties held multiple settlement discussions from November 2016 through March 2017. On March 20, 2017, the Settling Parties executed the Settlement Agreement that is the subject of their Joint Motion.

On September 1, 2017, the assigned Administrative Law Judge (ALJ) served his proposed decision which approved of the Settlement Agreement in part. While the majority of the terms were acceptable as they complied with the Commission's operative standards for approving settlements, the ALJ was concerned that the proposed payment of \$1,000,000 to the State General Fund was too low in view of the severity of the *ex parte* violations, and because the State General Fund was receiving significantly less money than the amounts that would be paid to the City of San Carlos and City of San Bruno. The proposed decision gave PG&E 20 days to agree to pay an additional \$11,000,000 to the State General Fund.

On September 21, 2017, PG&E filed its *Motion in Response to September 1, 2017 Proposed Decision (September 21 Motion)*. PG&E agreed to pay an additional \$11,000,000 to the State General Fund, bringing the payment to \$12,000,000. But as part of its *September 21 Motion*, PG&E disclosed for the first time additional e-mails from the 2013 to 2014 time frame that "appear to raise issues similar to other communications that the Non-PG&E parties asked to bring into this proceeding and that became part of the basis for the Settlement Agreement in

²⁷ *Id.* at 7-8.

this matter.”²⁸ On the same day, PG&E also filed a *Motion for Leave to File Communications Containing Confidential Material Under Seal*.

On November 1, 2017, the Non-PG&E parties filed their *Joint Response* to the *September 21 Motion*. The Non-PG&E parties asked that the Commission adopt the Settlement Agreement, as modified, with PG&E paying the additional \$11,000,000 to the State General Fund. The Non-PG&E parties also asked that the Commission should open up a second phase in this proceeding to consider the additional potential *ex parte* violations that were disclosed in the *September 21 Motion*.

6. Settlement Agreement Terms

While the Settlement Agreement is attached hereto as Attachment A, we set forth the three sections that are pertinent to the Commission’s evaluation of the Settlement Agreement’s reasonableness.

6.1. PG&E’s Admissions that it Violated Commission Rules and that its Conduct Harmed Customers and Constituents

Article II, § 2.1.A: Violation of Commission Rules

During the period from 2010 to 2014, PG&E committed multiple violations of the Commission’s *ex parte* rules in Article 8 of the Rules of Practice and Procedure, through communications that were either prohibited or not reported to the Commission as required by these rules.

On at least one occasion during this time period, PG&E also violated Rule 12.6 of the Commission’s Rules of Practice and Procedure, which requires that parties to settlement negotiations hold such negotiations confidential, by disclosing to a Commission decisionmaker the contents of ongoing settlement negotiations.

²⁸ *September 21 Motion* at 2.

Finally, by the totality of these violations, PG&E also violated Commission Rule of Practice and Procedure 1.1.

Article II, § 2.1.B: Conduct Harmful to Customers and Other Constituents

PG&E's employees and agents engaged in communications with decisionmakers at the Commission, as well as related conduct that was harmful to the regulatory process. Under the unique circumstances of this case, where the two Cities who are parties to this Settlement Agreement brought certain of these communications forward and participated in proceedings which the communications concerned, it is reasonable that compensation and other financial and non-financial remedies be awarded to those two Cities as part of a comprehensive Settlement Agreement resolving these issues, and to customers more generally.

Although in the Joint Motion and the Settlement Agreement state that "PG&E committed multiple violations of the Commission's *ex parte* rules in Article 8 of the Rules of Practice and Procedure,"²⁹ neither document specifies the exact number of "multiple violations." In order to gain greater clarity on the issue, on June 19, 2017 the assigned ALJ sent an e-mail ruling that, *inter alia*, asked PG&E how many violations it committed. On June 23, 2017, PG&E filed and served its response where it admitted to 12 violations which are identified as follows:

²⁹ Joint Motion at 11.

| Identification/Exhibit Number | Date | Author | Recipient (including cc's) | Comment |
|--------------------------------------|----------------|---|---|--|
| Tab 2-1/Ex. 2-0009 | May 31, 2010 | Brian Cherry, PG&E's Vice President of Regulatory Affairs | Thomas Bottorff, Senior Vice President – Regulatory Relations, PG&E | The e-mail summarizes a meeting between Brian Cherry and Michael Peevey, then President of the California Public Utilities Commission. The discussion included revisions PG&E claimed were needed to the Oakley proposed decision. |
| Tab 2-2/Ex.2-0019 | Sept. 20, 2011 | Jerry Hallisey, Esq. Hallisey and Johnson | Brian Cherry and Thomas Bottorff | The e-mail summarizes the discussion between Hallisey and Commissioner Ferron regarding the gas pipeline project and possible ratepayers' payment for upgrading the gas system. |

| | | | | |
|--------------------|------------------|--------------------|---|--|
| Tab 2-3/Ex. 2-0027 | Nov. 22, 2011 | Jerry Hallisey | Marc Joseph, Attorney, and Bob Balgenorth. CC: Brian Cherry and Thomas Bottorff | The e-mail summarizes Brian Cherry's conversation with Commissioner Florio regarding issuing a memorandum account at the end of the OIR. |
| Tab 2-4/Ex.2-0039 | March 2, 2012 | Susan [Kennedy] | Brian Cherry | The e-mail summarizes a meeting between President Peevey and Susan regarding an independent forensic analysis. |
| Tab 2-5/Ex.2-0046 | January 1, 2013 | Brian Cherry | Thomas Bottorff | The e-mail summarizes a meeting between Cherry and Peevey regarding City of San Bruno and the Gas Settlement. |
| Tab 2-9/Ex.2-0066 | January 28, 2014 | Sidney Dietz, PG&E | Michael Campbell, ORA | The e-mail summarizes a conversation with Scott M [Murtishaw], advisor to President Peevey, regarding possible measures related to a cost-effectiveness showing. |

| | | | | |
|--------------------|-----------------|--------------|--|---|
| Tab 2-10/Ex.2-0073 | March 6, 2014 | Brian Cherry | Erik Jacobson, Director Regulatory Affairs, PG&E, and Meredith Allen, Senior Director Regulatory Relations, PG&E | The e-mail summarizes a conversation between Brian Cherry and Commissioner Florio about whether to bump Administrative Law Judge Roscow from a proceeding. |
| Tab 2-11/Ex.2-0080 | August 29, 2010 | Brian Cherry | Thomas Bottorff | The e-mail summarizes a meeting between Brian Cherry, President Peevey, and Carol [Brown, President Peevey's Chief of Staff] about efforts to settle a GRC (General Rate Case). |
| Tab 2-21/Ex.2-099 | Dec. 18, 2013 | Brian Cherry | Commissioner Florio and Sepideh Khosrowjah, Commissioner Florio's Chief of Staff | The e-mail attaches information that was provided to another Commission employee (Elizaveta Malashenko regarding Line 147 questions. |

| | | | | |
|--------------------|---------------------------------------|--------------|---------------------|--|
| Tab 2-22/Ex.2-0307 | Dec. 18, 2013 (nine emails) | Brian Cherry | Commissioner Florio | Although listed as one exhibit, there are nine e-mails between Brian Cherry and Commissioner Florio regarding Line 147. |
| Tab 23/Ex.2-0318 | Dec. 19, 2013 | Brian Cherry | Commissioner Florio | This e-mail discusses information regarding automated valves associated with Line 147. |
| Tab 24/Ex.2-0331 | Dec. 19, 2013 | Brian Cherry | Commissioner Florio | The e-mail provides information regarding Line 147 cold weather operations. |

By our count, however, there are 20 violations. One of the 12 to which PG&E admits had a total of nine e-mails (Tab 2-22). Each e-mail should be seen as a separate violation of the Commission's *ex parte* rules.

6.2. The Breakdown of PG&E's \$97.5 Million Financial Remedy

There are four components to the financial remedy:

Article II, § 2.2.A: General Fund Remedy

PG&E shall pay \$12 million to the State of California General Fund. This shall be a fine payable pursuant to Section 2100 *et seq.* of the Public Utilities Code. This payment shall not be deductible for tax purposes.

Article II, § 2.2.B: Gas Transmission and Storage Rate Case
Ratemaking Remedy

PG&E shall additionally forego collection of \$63,500,000 in revenue requirements for the years 2018 (\$31,750,000) and 2019 (\$31,750,000) as determined in its Gas Transmission and Storage rate case. This remedy shall be implemented through PG&E's Annual Gas True-up Advice Letter. The Non-PG&E Parties intend for these foregone collections of revenue requirements to be punitive in nature and therefore not tax deductible. PG&E intends that these foregone collections of revenue be compensatory in nature and that PG&E not be taxed on these foregone collections of revenue (or, in the alternative, that these foregone collections of revenue offset PG&E's taxable income).

Article II, § 2.2.C: General Rate Case Ratemaking Remedy

In order to address the Non-PG&E Parties' concerns about 1) PG&E's internal costs of improving compliance and training related to the *ex parte* rules, 2) PG&E's internal costs of litigation of any issues arising from PG&E's late filed notices of *ex parte* communications and notices of improper *ex parte* communications including litigation of this proceeding, and 3) compensation paid to certain PG&E officers from 2010 to 2014 involved in the *ex parte* communications at issue in this proceeding, PG&E shall implement a one-time adjustment of \$10,000,000 to be amortized in equivalent annual amounts over its next General Rate Case (GRC) cycle, (i.e., the GRC following the 2017 GRC). It is the Parties' intent that PG&E not be taxed on these ratemaking adjustments (or, in the alternative, that these adjustments offset PG&E's taxable income) because they are intended to compensate ratepayers for bearing PG&E's costs described in this Paragraph through GRC rates. Furthermore, for purposes of forecasting future costs in the next two GRCs before the Commission, PG&E will adjust out of recorded data those outside services costs incurred that correspond to (i) improving compliance and training related to the *ex parte* rules from September 2014 to March 2017 and (ii) litigating any issues arising from PG&E's late filed notices of *ex parte* communications and notices of improper *ex parte* communications including litigation of this proceeding. The Non-PG&E Parties shall not recommend any adjustment to the

categories of costs described in this Paragraph in the next GRC or any other rate case before the Commission on the basis that the costs described in this Paragraph were incurred by PG&E because of, or related to, the *ex parte* issues described herein.

Article II, § 2.2.D: Compensation payable to the City of San Bruno and the City of San Carlos

Within 30 days of Commission approval, PG&E shall pay:

- \$6,000,000 to the City of San Bruno General Fund.
- \$6,000,000 to the City of San Carlos General Fund.

These payments are intended to compensate the City of San Bruno and the City of San Carlos for attorneys' fees, expenses, and any other harm caused on account of the conduct described in Section 2.1.B, under the unique circumstances of this proceeding.

6.3. Changes in PG&E's Interactions with Decisionmakers, Parties, and Employees to Promote Greater Transparency and Understanding of Commission Rules

Article II, § 2.3.A: Notice of Tours Provided to CPUC Decisionmakers

For a period of two years, beginning January 1, 2018, if PG&E gives a tour of its facilities to a Commission decisionmaker, it will provide notice within three days of the tour in an open General Rate Case, Gas Transmission and Storage rate case, or other relevant cost recovery case if the facility, technology, process, or information to be addressed during the tour is at issue in such a case, and will additionally invite a representative of the Office of Ratepayer Advocates, the Safety and Enforcement Division, and The Utility Reform Network to attend the tour. The notice will include a summary of PG&E's oral presentation(s) during the tour and provide all written materials shown to or provided to a Commission decisionmaker during the tour.

Article II, § 2.3.B: Notice of Transmittals of Rating Agency and Investor Analyses to CPUC Decisionmakers

For a period of three years following Commission approval of the Settlement Agreement in this matter, if PG&E transmits via email a credit rating agency or investor report or analysis to a Commission decisionmaker, PG&E simultaneously will provide a copy to designated representatives of the Office of Ratepayer Advocates, the Safety and Enforcement Division, The Utility Reform Network, and all parties in PG&E's most recent cost of capital, General Rate Case, and Gas Transmission and Storage proceedings.

Article II, § 2.3.C: Notice of "Meet and Greet" Meetings Between Certain PG&E Officers and CPUC Decisionmakers

For a period of two years following Commission approval of the Settlement Agreement in this matter, if PG&E Corporation's Chief Executive Officer, PG&E's President, PG&E Corporation's Chief Financial Officer, or its Executive Vice President and General Counsel, participates in a meeting arranged or accepted by PG&E to be attended only by PG&E and its agents and the Commissioner and/or the Commissioner's advisors, PG&E will provide notice within three days to designated representatives of the Office of Ratepayer Advocates and The Utility Reform Network. Such notice will include any written materials used during the meeting or discussion and a summary of PG&E's oral communications.

Article II, § 2.3.D: Training for PG&E Employees

PG&E provides annual training on the Commission's *ex parte* rules, and for three years following Commission approval of the Settlement Agreement in this matter, PG&E will provide to the other Parties to I. 15-11-015 (a) a copy of the training materials used for this purpose, and (b) an annual certificate of completion for the training of all officers, Regulatory Affairs employees and Law Department attorneys. PG&E shall provide an initial training within one year of Commission approval of the Settlement Agreement in this matter.

7. Legal Standard for Evaluating Whether to Adopt or Reject Settlement Agreements

In deciding whether the Settlement Agreement should be adopted, we are guided by Rule 12.1(d) of the Commission's Rules of Practice and Procedure. That Rule states: "The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with laws, and in the public interest." If the moving parties assert that the Settlement Agreement is supported by all parties, then the Commission must confirm:

- that the settlement commands the unanimous sponsorship of all active parties to the instant proceeding;
- that the sponsoring parties are fairly reflective of the affected interests;
- that no term of the settlement contravenes statutory provision or prior Commission decisions; and
- that the settlement conveys to the Commission sufficient information to permit us to discharge our future regulatory obligations with respect of the parties and their interests.³⁰

As a matter of policy, the Commission favors the settlement of disputes. (D.11-05-018, 16; D.07 05 060, 6; and D.88-12-083.) This policy supports many goals, including reducing the expense of litigation, conserving scarce Commission resources, and allowing parties to reduce the risk that litigation will produce unacceptable results. As long as a settlement is reasonable in light of the whole record, consistent with the law, and in the public interest, it should normally be adopted without alteration. (D. 06-06-014, 12; and D. 90-08-068.)

³⁰ D.92-12-019; and D.90-08-068, 37.

There is, however, precedent that allows the Commission to reject a settlement either in its entirety or in part. Pursuant to Rule 12.4, the Commission “may reject a proposed settlement whenever it determines that the settlement is not in the public interest,” and may also “propose alternative terms to the parties to the settlement.” Although this authority seems, at first, to be contrary to the policy favoring settlements, both the authority to accept a settlement or to reject and propose alternative terms stem from the Commission’s overarching duty to adopt a settlement that is in the public interest.

It is with these policy goals in mind that we analyze the proposed settlement that the settling parties have presented to the Commission for approval.

7.1. The Settlement Agreement is Reasonable in Light of the Record as Supplemented by the Settlement Agreement

This OII has been a contentious proceeding with the Settling Parties having to deal with a myriad of factual, procedural, and legal issues engendered by PG&E’s release of approximately 67,000 e-mails. First and foremost was the need for the parties to attempt to reach an agreement on the number of *ex parte* violations that were in dispute before the proceeding. As can be seen, *supra*, after culling through the tens of thousands of e-mails that PG&E produced, the parties narrowed down the potential number of *ex parte* violations to be between 22 and 164 and grouped them into three distinct categories. That the parties were able to agree to a range of potential *ex parte* violations is a testament to the efforts that the Settling Parties exerted in reaching a consensus. Second, during the meet and confer process, the parties had to come to an agreement to stipulations and protocols that would facilitate the efficient resolution of this

proceeding. The procedural agreements that lead to the Settlement Agreement are as follows:

- Agreed to recommend adding communications to the proceeding, in order for the Commission to resolve the *ex parte* issues completely in one proceeding, and to drop others that all agreed were not violations.
- Agreed to stipulations concerning all 164 communications at issue.
- Agreed that PG&E would respond to data requests concerning emails for which the Non-PG&E Parties sought additional information.
- Agreed to a process for efficiently conducting this discovery, to ensure that information was gathered on a timeline consistent with the Commission's stated expectations, and to prevent time-consuming discovery disputes.
- Agreed to a procedure for moving undisputed facts into the evidentiary record, and to the creation of a single joint record for the proceeding.

Third, the Settling Parties had to address the legal questions of what were *ex parte* communications that required reporting, and what *ex parte* communications were prohibited. During the negotiation process, PG&E maintained that most of the communications were permissible information sharing, rather than substantive communications. Yet PG&E recognized that the Commission might find otherwise and impose substantial penalties for the harm done to the Commission, the City of San Carlos, and the City of San Bruno.

When we consider all of these factors, we find the Settlement Agreement is reasonable as it addresses PG&E's wrongful conduct, PG&E's financial payments, and PG&E's changes to its protocol for dealing with decisionmakers to make sure the wrongful conduct does not occur in the future. First, PG&E has admitted to "multiple violations of the *ex parte* rules, Rule 12.6, and Rule 1.1 of

the Commission's Rules of Practice and Procedure (Article II, §2.1.A). PG&E has admitted that these violations were harmful to customers and other constituents (Article II, §2.1B). Second, PG&E has agreed to forego \$63,500,000 in revenue requirements, make a one-time adjustment of \$10,000,000 amortized in equivalent annual amounts over its next General Rate Case, and to compensate the City of San Bruno and the City of San Carlos \$6,000,000 each (Article II, § 2.2B, C, and D). Third, PG&E has agreed to pay \$12,000,000 to the State General Fund (Article II, §2.2.A). Fourth, PG&E has agreed to implement certain protocols regarding notice of tours provided to Commission decisionmakers (Article II, § 2.3.A), notice of transmittals of rating agency and investor analyses to Commission decisionmakers (Article II, § 2.3.B), notice of meet and greet meetings between certain PG&E officers and Commission decisionmakers (Article II, § 2.3.C), and to implement annual training for PG&E employees for three years regarding *ex parte* rules (Article II, § 2.3.D). Taken together, we find the Settlement Agreement to be reasonable.

7.2. The Settlement Agreement is Consistent with Law

The issue of sanctions to be imposed encompasses consideration of Pub. Util. Code § 2107, which sets a \$500 minimum and a \$50,000 maximum fine for each offense, and § 2108, which provides that every day is a separate offense. It also encompasses consideration of the five factors to consider in assessing fines, as identified in the Affiliate Rulemaking Decision, D.98-12-075, as follows:

- How many days did each violation continue?
- What harm was caused by virtue of the violations? This includes harm to the integrity of the regulatory process.
- What was the utility's conduct in preventing, detecting, correcting, disclosing and rectifying the violation?

- What amount of fine will achieve the objective of deterrence?
- What fine or sanction has the Commission imposed under reasonably comparable factual circumstances?

Thus, in determining if the settlement is consistent with the law, we must weigh the individual settlement amounts against the factors that the Commission is required to evaluate in assessing a fine.

**7.2.1. Forgoing Revenues, Making Adjustments,
and Making Payments to the State General
Fund, the City of San Carlos, and the City of
San Bruno**

To determine if this sum of \$96.5 Million is reasonable, we must look at Commission precedent in other similar proceedings which is, unfortunately, scant. As this Commission observed in *Decision Affirming Violations of Rule 8.4 and Rule 1.1 and Imposing Sanctions on Southern California Edison Company*,³¹ “Commission precedent in imposing sanctions for *ex parte* violations has ranged from relatively minor fines, or none at all, to requiring training on ethics and the Commission’s *ex parte* rules, to mere admonishments.” Prior to December of 2015, the largest penalty imposed for violating the *ex parte* rules was imposed on PG&E for \$1,050,000, coupled with the requirement that PG&E’s shareholders fund a ratemaking disallowance (estimated at approximately \$72 million) in reparation to ratepayers of a significant portion of the revenue requirement that would have been collected during the five-month delay caused by PG&E’s actions.³² On December 8, 2015, the Commission issued D.15-12-016 (*Decision*

³¹ D.15-12-016, 44; see also *Decision Modifying Law and Motion Judge’s Ruling Imposing Sanctions for Violation of Ex Parte Rules* (D.14-11-041, 11 [same].)

³² D.14-11-041, 13 (20 *ex parte* violations times \$50,000, plus an additional \$50,000 for the single violation of Rule 1.1); and Ordering Paragraph 3. PG&E estimates that the disallowance will

Footnote continued on next page

Affirming Violations of Rule 8.4 and Rule 1.1 and Imposing Sanctions on Southern California Edison Company), wherein SCE received a fine of \$16,740,000 (\$190,000 [eight *ex parte* violations]; \$16,520,000 [continuing Rule 1.1 violation calculated at \$20,000 x 826 days]; and \$30,000 [for a second Rule 1.1 violation].) Compared with similar *ex parte* violations in other proceedings, it appears that PG&E's agreement to forgo \$63,500,000, to make a GRC adjustment of \$10,000,000, to pay \$12,000,000 to the State General Fund, and to pay \$12,000,000 to the Cities of San Bruno and San Carlos, would be the highest settlements reached. In that regard, we conclude that those aspects of the Settlement Agreement are consistent with the law.

7.3. The Settlement Agreement is in the Public Interest

As we recognized above, there is a strong public policy favoring the settlement of disputes to avoid costly and protracted litigation. With the adjustment in the amount of the fine paid to the State General Fund, we believe that this Settlement Agreement is in accordance with California's public policy favoring resolution. The Settlement Agreement has, to a great extent, put an end to years of disputes between the Commission, Commission staff, PG&E, the City of San Bruno, the City of San Carlos, ORA, SED, and TURN that has spanned at least nine separate proceedings following the San Bruno tragedy. This resolution has allowed all sides to avoid the cost of further proceedings as to these issues,

ultimately total approximately \$72 million. (Joint Motion at 20.) *See also Decision Affirming Violations of Rule 8.4 and Rule 1.1 and Imposing Sanctions on Southern California Edison Company* (D.15-12-016, 46 [eight *ex parte* violations and one non-continuing Rule 1.1 violation times \$50,000 equals \$450,000].

the result of which is an uncertainty for the Settling Parties. As such, the Settlement Agreement furthers California's public interest in resolving disputes.

7.4. The Settlement Agreement has the Unanimous Sponsorship of the Parties

PG&E, the City of San Bruno, the City of San Carlos, ORA, SED, and TURN are all the parties to this proceeding and have jointly agreed to the Settlement Agreement and the Motion for adoption of same.

7.5. The Settlement Agreement Conveys Sufficient Information to Allow the Commission to Discharge its Regulatory Obligations with Respect to the Settling Parties and their Interests

The Settlement Agreement, when combined with the stipulations and exhibits accepted into evidence, has sufficient factual information to allow this Commission to discharge its regulatory obligations. Specifically, the parties have agreed that the Settlement Agreement resolves the following:

The Parties agree that this Settlement Agreement is entered to provide a comprehensive resolution of PG&E's alleged violations of the Commission's *ex parte* rules from 2010 through 2014, including the communications from: (a) the City of San Bruno's Public Records Act requests to the Commission, as described in San Bruno's July 2014 Motion; (b) documents PG&E produced to the Commission in January 2015, pursuant to a January 13, 2015 Administrative Law Judge ruling in A.13-12-012, which documents were subsequently posted on the Commission's website; (c) documents PG&E produced in discovery in A.13-12-012; and (d) communications reported to the Commission by PG&E in late-filed notices of *ex parte* communications and notices of improper communications, filed in September, October and December 2014, and May and June 2015. As such, the Non-PG&E Parties agree that they will not file or re-open any proceedings, or seek additional relief from the Commission or any other court, agency, or body for these alleged violations of the Commission's *ex parte* rules by PG&E.

The Settling Parties have detailed the steps leading up to the terms of the Settlement Agreement, the factors that the parties weighed in determining the payments, the monies PG&E agreed to forgo, as well as what steps PG&E has agreed to implement on a foregoing basis to ensure that the *ex parte* violations do not occur again in the future. The Commission believes it has sufficient information to determine that the Settlement Agreement meets the criteria set forth in Rule 12.1(d).

8. Comment Period

As the Settling Parties are in complete agreement regarding the Settlement Agreement, we deem this revised decision to be uncontested so that the 30-day comment period may be waived pursuant to Rule 14.6 (c)(2).

9. Assignment of Proceeding

Michael Picker is the assigned Commissioner and Robert M. Mason III is the assigned ALJ in this proceeding.

Findings of Fact

1. On January 11, 2008, in D.08-01-021, the assigned Commissioner and the assigned ALJ determined that PG&E violated the Commission's *ex parte* rules after PG&E acknowledged in a May 22, 2007 filing that it had failed to provide a three-day notice of two May 17, 2007 meetings with decisionmakers concerning A.06-11-005. The Commission approved as a remedial action that PG&E should develop written best practices to document, control, and report on *ex parte* contacts.

2. On November 26, 2014, in D.14-11-041, the Commission found that PG&E committed 20 violations of Rule of Practice and Procedure 8.3(f) and a single violation of Rule 1.1 for communications between PG&E and the Commission decisionmakers concerning the assignment of the ALJ for PG&E's then-pending

GT&S case, A.13-12-012. The Commission, citing to D.08-01-021, imposed a financial penalty of \$1,050,000 for PG&E's violations, and ordered that its shareholders fund a disallowance for certain revenue to be collected from customers during the five month delay caused by the Order to Show Cause proceeding that arose from PG&E's violations. The communications at issue in this proceeding predate the Commission's decision in D.14-11-041, and in that decision the Commission acknowledged that PG&E had "admit[ted] to other improper *ex parte* communications in different proceedings" – referring to some of the communications at issue in this proceeding. In D.14-11-041, the Commission elected only to resolve *ex parte* issues concerning A.13-12-012.

3. The Commission instituted this OII on November 23, 2015.

4. The Commission's OII identified 48 communications as being at issue in this proceeding– seven communications self-reported or late-noticed by PG&E and 41 communications that the City of San Bruno alleged in its July 2014 motion were *ex parte* violations.

5. On January 8, 2016, the Commission directed the Settling Parties to engage in a substantive and detailed meet and confer process to develop an efficient procedural schedule to resolve the issues identified in the OII.

6. During the meet and confer process, the Non-PG&E Parties (i.e. the City of San Bruno, the City of San Carlos, ORA, SED, and TURN) requested that a number of communications be added to the proceeding record, which were identified from: (a) the City of San Bruno's Public Records Act requests to the Commission, as described in San Bruno's July 2014 Motion; (b) documents PG&E produced to the Commission in January 2015, pursuant to a January 13, 2015 Administrative Law Judge's Ruling in A.13-12-012, which documents were subsequently posted on the Commission's website; (c) documents PG&E

produced in discovery in A.13-12-012; and (d) communications reported to the Commission by PG&E in late filed notices of *ex parte* communications and notices of improper communications, filed in September, October and December 2014, and May and June 2015.

7. The Settling Parties conferred in detail and reached agreement regarding which communications should be added to the proceeding record and which should be not further considered.

8. In the interest of resolving all issues related to alleged *ex parte* violations efficiently and completely in a single, comprehensive proceeding, the Settling Parties agreed to add more than 100 communications to this proceeding's record – bringing the total to 164 communications.

9. The Settling Parties do not agree as to whether each of these communications are violations, though PG&E has previously acknowledged that some of these did violate the Commission's *ex parte* rules.

10. As part of the meet and confer process, the Settling Parties worked cooperatively and constructively to resolve this matter. The Settling Parties:

- Agreed to factual stipulations concerning all 164 communications at issue.
- Agreed that PG&E would respond to discovery concerning emails for which the Non-PG&E Parties sought additional information.
- Agreed to a process for efficiently conducting this discovery, to ensure that information was gathered on a timeline consistent with the Commission's stated expectations, and to prevent time-consuming discovery disputes.
- Agreed to a procedure for moving undisputed facts into the evidentiary record, to create a joint record for the proceeding.

11. After completing the discovery and factual stipulations discussed above, the Settling Parties engaged in multiple settlement discussions in person, by telephone, and by e-mail from November 2016 through March 2017.

12. As a result, the Settling Parties have entered into this Settlement Agreement, subject to approval by the Commission.

13. According to the terms of the Settlement Agreement, PG&E has agreed to do the following:

- Admit to violating the Commission's *ex parte* rules, Rule 12.6, and Rule 1.1;
- Admit that its violations have harmed its customers and constituents;
- Make a payment to the State General Fund of \$12 million;
- Forgo collection of \$63,500,000 in revenue requirements for the years 2018 and 2019 as determined in its GT&S rate case;
- Implement a one-time adjustment of \$10,000,000 to be amortized in equivalent annual amounts over its next GRC cycle;
- Make payments in the amount of \$6,000,000 each to the City of San Bruno and City of San Carlos General Funds;
- Provide notice of tours provided to Commission decisionmakers;
- Provide notice of transmittals of Rating Agency and Investor Analyses to Commission decisionmakers;
- Provide notice of meet and greet meetings between certain PG&E officers and Commission decisionmakers; and
- Provide annual training for PG&E employees regarding the Commission's *ex parte* rules.

14. On June 19, 2017, the assigned ALJ sent an e-mail ruling that asked PG&E, *inter alia*, how many *ex parte* violations it committed.

15. On June 23, 2017, PG&E filed and served its response where it admitted to 12 *ex parte* violations, which it identified by Tab number and Exhibit number.

16. PG&E's admitted violations have cast public suspicion on the integrity of the Commission's regulatory process.

17. PG&E's admitted violations have harmed the Commission's regulatory process to such an extent that the proposed \$1 million fine to the State General Fund should be increased to \$12 million, an amount commensurate to the fines that PG&E has agreed to pay to the City of San Bruno and City of San Carlos General Funds.

18. On September 1, 2017, the ALJ served his proposed decision which approved of the Settlement Agreement in part. While the majority of the terms were acceptable as they complied with the Commission's operative standards for approving settlements, the ALJ was concerned that the proposed payment of \$1,000,000 to the State General Fund was too low in view of the severity of the *ex parte* violations, and because the State General Fund was receiving significantly less money than the amounts that would be paid to the City of San Carlos and City of San Bruno. The proposed decision gave PG&E 20 days to agree to pay an additional \$11,000,000 to the State General Fund.

19. On September 21, 2017, PG&E filed its *Motion in Response to September 1, 2017 Proposed Decision (September 21 Motion)*. PG&E agreed to pay an additional \$11,000,000 to the State General Fund, bringing the payment to \$12,000,000.

20. But as part of its *September 21 Motion*, PG&E disclosed for the first time additional e-mails from the 2013 to 2014 time frame that "appear to raise issues similar to other communications that the Non-PG&E parties asked to bring into this proceeding and that became part of the basis for the Settlement Agreement in this matter." On the same day, PG&E also filed a *Motion for Leave to File Communications Containing Confidential Material Under Seal*.

21. On November 1, 2017, the Non-PG&E parties filed their *Joint Response* to the *September 21 Motion*. The Non-PG&E parties asked that the Commission adopt the Settlement Agreement, as modified, with PG&E paying the additional \$11,000,000 to the State General Fund.

22. The Non-PG&E parties also asked that the Commission open up a second phase in this proceeding to consider the additional potential *ex parte* violations that were disclosed in the *September 21 Motion*.

Conclusions of Law

1. All issues in this proceeding are encompassed by, and resolved in the Settlement Agreement.

2. The parties to the Settlement Agreement are all of the active parties in this proceeding.

3. The parties are fairly reflective of the affected interests.

4. No term of the Settlement agreement contravenes statutory provisions or prior Commission decisions.

5. The Settlement Agreement is reasonable in light of the record, is consistent with law, and is in the public interest.

6. With the exception of the recently disclosed e-mails, the Settlement Agreement fully resolves and settles all disputed issues in the OII.

7. The Settlement Agreement should be approved.

8. PG&E's *Motion for Leave to File Communications Containing Confidential Material under Seal* should be granted.

9. The Commission should open up a second phase to determine if any of the recently disclosed e-mails violate the Commission's *ex parte* rules.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement between the City of San Bruno, the City of San Carlos, the Office of Ratepayer Advocates, the Safety Enforcement Division, The Utility Reform Network, and Pacific Gas and Electric Company (The Parties), is approved. The Parties have agreed that Article II, § 2.2.A. is revised so that Pacific Gas & Electric Company shall pay \$12 million to the State of California General Fund.

2. Once this revised proposed decision becomes final, Pacific Gas and Electric Company shall make a payment of \$12 million, payable to the Commission and addressed as follows: California Public Utilities Commission Fiscal Office, Room 3000, 505 Van Ness Avenue, San Francisco, CA 94102, in the form of a certified check payable to the Public Utilities Commission for credit to the State General Fund.

3. The Commission orders a second phase in this proceeding in order to determine if the e-mails that Pacific Gas and Electric Company disclosed on September 21, 2017 violate the *ex parte* rules set forth in the Commission's Rules of Practice and Procedure.

4. Investigation 15-11-015 shall remain open.

This order is effective today.

Dated April 26, 2018, at San Francisco, California.

MICHAEL PICKER

President

CARLA J. PETERMAN

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

Commissioners